Supreme Court, U. S.
FILED
DEC 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-630

STATE OF WASHINGTON, *et. al.*,
Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

MOTION OF APPELLEE COLVILLE CONFEDERATED TRIBES, LUMMI INDIAN TRIBE AND MAKAH INDIAN TRIBE TO DISMISS OR AFFIRM

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November 30, 1978

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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The Appellee Colville, Lummi and Makah Indian Tribes, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument. Alternatively, and in addition, the Colville, Lummi and Makah Tribes [hereinafter referred to as the Tribes] move that those portions of the appeal relating to the validity of the State excise taxes on motor vehicles and to the State's assumption of partial territorial jurisdic-

tion over Indian reservations pursuant to RCW 37.12.-010, be dismissed on the ground that the appeal is not within the jurisdiction of this Court because the filing of the Notice of Appeal[1] was not timely.

QUESTIONS PRESENTED

1. CIGARETTE TAX: Whether the imposition of the State of Washington cigarette tax pursuant to RCW Chapter 82.24 and the administrative regulations promulgated thereunder, as well as any enforcement against the Tribes or their licensed dealers, are unlawful in that the State cigarette tax has been preempted by the comprehensive tribal taxing ordinances or constitutes a prohibited interference with tribal self-government?

2. MOTOR VEHICLE, MOBILE HOME, TRAVEL TRAILER AND CAMPER TAXES: Whether the imposition by the State of Washington of a motor vehicle "excise" tax under RCW 82.44 and 82.50 on motor vehicles, motor homes, travel trailers, and campers, measured by a fixed annual percentage of the value of the vehicle, as applied to Indian-owned vehicles that are used both off and on the reservation, is unlawful as an infringement on the rights of the members of the Tribes as secured under federal statutes and treaties?[2]

3. PUBLIC LAW 83-280: Whether the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, insofar as such jurisdiction has been assumed on a partial territorial basis as against the Lummi Indian Tribe and the Makah Indian Tribe or any of their reservation resident members, is unlawful as a denial of equal protection under the United States Constitution?[3]

1. The State has filed four Notices of Appeal in these cases. Appendix G, H, I and J. The reference here is to the issues raised separately in the Notice of Appeal to the Supreme Court of the United States, Civil No. 3868, dated July 10, 1978, Appendix G to the Jurisdictional Statement; Issues 6 and 7 in the Questions Presented portion of the State's Jurisdictional Statement.

2. The appellee Tribes contend that this issue is not properly before the Court because the Notice of Appeal raising it was not timely filed. See discussion of Motion to Dismiss, *infra*.

STATEMENT

In the proceedings below, the three judge District Court determined that the State of Washington's cigarette tax, as applied to on-reservation sales of cigarettes by Indians to non-Indians, had been preempted by comprehensive taxing and regulatory ordinances enacted by the Tribes and that to allow the State to superimpose its taxes upon the tribally taxed sales of cigarettes would constitute an interference with tribal self-government prohibited by the decisions of this Court. The Court also struck down several State taxes on Indian-owned motor vehicles, mobile homes, campers and trailers which, although labeled as "excise" taxes by the State legislature, were identical in operation to the property tax struck down by this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-81 (1976). The Court also decided certain questions raised by the parties relative to Washington's assumption of civil and criminal jurisdiction pursuant to Public Law 83-280. The Public Law 83-280 issues raised by the State will presumably be resolved by this Court in *State of Washington v. Confederated Tribes and Bands of the Yakima Nation*, No. 77-388, already argued this term, and will not be discussed further here.

3. This issue, like the motor vehicle excise tax question, was raised by the State in a Notice of Appeal that was not timely filed. See Motion to Dismiss, *infra*.

In its Jurisdictional Statement at 7-9 the State argues that this appeal presents seven separate federal questions. However, the State seriously exaggerates both the complexity of the case and the substantiality of the issues presented. For example, the second question presented by the State is whether the State may require an Indian tribe or Indian retailers to collect State taxes from Indian purchasers who are not members of the tribe occupying the reservation where the sale occurs. Jurisdictional Statement at 8. Relative to the State cigarette tax issue, however, this question was not reached by the Court because of its determination in No. 3868, that the entire State taxing scheme, as applied to the Tribes, must fail. 446 F. Supp. 1339, 1365 n. 21, State Appendix A at 41 n. 21. Insofar as this issue was discussed by the Court in No. 3909 relative to the State sales tax applied to the Yakima Indian Reservation, 446 F. Supp. at 1371, State Appendix A at 54-55, it is a non-appealable dictum since it was not included in the District Court's final order. Appendix C at 71-74. This Court therefore lacks jurisdiction to review it pursuant to 28 U.S.C. §1253. *See* further discussion in brief of Appellee Yakima Tribe.

Question three, concerning the validity of the State's enforcement mechanisms and reporting requirements, to the extent it relates to the cigarette tax, is subsumed within the more general question of the tax's validity. If, as the Tribes contend, the District Court correctly determined that the State cigarette taxes cannot be applied to the Tribes, the enforcement questions are irrelevant.[4] Similarly, the District Court specifically determined that in light of its holding, it need not reach the questions regarding the legality of various enforcement measures such as confiscation of interstate shipments of cigarettes and levy against tribal property, which the State proposed to utilize. 446 F. Supp. at 1365 n. 21, Appendix A at 41 n. 21. Accordingly, this Court should not review questions 4 and 5 until the lower court has an opportunity to review them after remand if this Court determines the transactions are taxable and reverses the judgment below. The focus of the Tribes' remarks, therefore, will be on the correctness of the Court's resolution of the cigarette tax and motor vehicle tax issues.

4. Insofar as this question refers to the District Court's invalidation of the State's reporting requirements on tax-exempt sales to Indians for purposes of enforcing the State sales tax, it relates only to No. 3909 and will be addressed by the Appellee Yakima Tribe.

The facts, as stated by the State in its Jurisdictional Statement, although basically accurate, are inomplete and need amplification. As Appellant notes, the parties entered into an extensive Pre-trial Order stipulating to the essential facts regarding the contents, structure and operation of the tribal ordinances for the licensing, regulation and taxation of sales of cigarettes on the reservation. Similarly, there was no dispute as to the disastrous effect that superimposing the State cigarette and tobacco taxes on the tribally taxed on-reservation sales would have. It is these facts, of course, which underlie the District Court's conclusion that imposition of the State tax would interfere with tribal self-government.

The essential stipulations regarding the structure of the tribal taxing and regulatory systems and their place in tribal self-government are set forth in §§ 2.1 through 2.20 of the Pre-trial Order. As the Court noted, the tribally-levied cigarette taxes ranged in amount from forty to fifty cents per carton and the revenues were an important

source of funding for various programs sponsored by the Tribes for social and economic development. From 1972 through 1976 the Colville Tribe earned approximately $265,760 in cigarette taxes while the Lummi and Makah Tribes earned approximately $54,440 and $13,490, respectively. 446 F. Supp. at 1347, Appendix A at 7.

The Court correctly emphasized that the Tribal ordinances were exercises of police as well as taxing power. Each ordinance provides that tobacco products, including cigarettes, shall remain the property of the tribe until ultimately sold, requires the tribal dealer to obtain both tribal and federal traders licenses as well as adequate personal and property liability insurance, prohibits sales of tobacco products to minors and restricts the numbers of cartons of cigarettes that can be sold to non-Indians. Penalties are set forth in the ordinances for violations. 446 F. Supp. at 1347-48, Appendix A at 7-8. As the District Court summarized, "each ordinance reads as a comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations." *Id.*

As to the economic and practical impact of the imposition of the State cigarette tax on the tribal programs, the Tribes presented affidavit testimony of an expert economist, undisputed by the State, that cigarettes are highly price elastic so that a small difference in price between competing sellers would have a substantial impact on purchasing habits. Because the tribal tax is smaller than the tax imposed by the State, a carton of cigarettes sells for approximately $1.10 to $1.20 less on the reservation than off, and approximately 90% of the tribal sales of cigarettes are made to non-Indians. 446 F. Supp. at 1347 and n. 5, Appendix A at 7-8 and n. 5. The District Court summarized the practical impact of imposition of the State tax as follows:

> The State tacitly concedes the Tribes' source of cigarette tax revenues would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribes' ability to fund its sponsored programs would suffer substantial interference.

446 F. Supp. at 1347, Appendix A at 7.

> In this case, both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers. The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probable destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs.

446 F. Supp. at 1362-1363, Appendix A at 37.

In summary, therefore, the District Court determined, and the State has not and cannot dispute, that, as a factual matter, imposition of the State cigarette tax on the tribally-taxed and regulated sales of cigarettes to non-Indians will have a substantial impact on tribal self-government. The only question is the legal one, whether this constitutes a prohibited interference with tribal self-government within the meaning of *Williams v. Lee*, 385 U.S. 217 (1959) and subsequent cases.

MOTION TO DISMISS

The Appellee Colville, Lummi and Makah Tribes hereby move to dismiss the portion of the State's appeal which challenges the Court's ruling on the validity of the State motor vehicle, travel trailer and camper excise taxing scheme as well as the portion concerning the invalidity of the partial assumption of territorial jurisdiction over the Makah and Lummi Reservations pursuant to RCW 37.12.010. This motion is made on the ground that Appellant did not file a timely notice of appeal within sixty days of the order appealed from as required by 28 U.S.C. §2101(b).

The chronology of events as disclosed in the State's Jurisdictional Statement and Appendix was as follows: On May 10, 1978, the Court's Declaratory Judgment and Decree of Permanent Restraint in No. 3868 was entered. Appendix B at 66. Included in the Order was the Court's determination of the inapplicability to the Tribes and their members of the State motor vehicle excise taxes as well as the invalidity of the State's assumption of partial territorial jurisdiction over the Makah and Lummi Reservations pursuant to RCW 37.12. On May 19, 1978, Appellant filed a Motion for Partial New Trial, Appendix D at 75, addressed exclusively to the issue of the validity of the State's application of cigarette and sales taxes to sales by the Tribes to non-Indians. On July 17, 1978, the three judge District Court denied the State's Motion for Partial New Trial, Appendix E at 77. On July 12, 1978, more than sixty days after the District Court entered its Declaratory Judgment and Decree of Permanent Restraint, the State filed a Notice of Appeal in Civil No. 3868 raising the motor vehicle ex-

cise tax issues and the Public Law 83-280 assumption of jurisdiction issues which had been decided adversely to the State by the Court. Appendix G at 81.

On August 14, 1978 the State filed a Notice of Appeal raising the cigarette tax issues. Appendix H at 24. This Notice was timely filed within sixty days of the denial of the State's motion for partial new trial. On September 8, 1978, the State filed an Amended Notice of Appeal, Appendix I at 87, raising all of the issues including the motor vehicle excise tax and Public Law 83-280 issues.

Ordinarily, of course, a petition for rehearing or motion for new trial suspends the finality of a district court judgment for purposes of appeal while it is pending. However, in the instant case, since the State's motion for partial new trial was specifically addressed by the State only to a portion of the District Court's judgment, it would seem that the motion did not affect the finality of the remaining portions of the judgment which were not challenged. Accordingly, the filing of the Notice of Appeal as to the issues unchallenged by the motion was not timely.

MOTION TO AFFIRM

Alternatively, Appellee Colville, Lummi and Makah Tribes move to affirm the manifestly correct judgment of the three-judge court. No substantial federal questions are presented for the reason that the decision below scrupulously follows the well-established guidelines set by this Court for judging the validity of attempts by states to tax persons, property and transactions on Indian reservations.

1. The District Court correctly determined that the imposition of the State cigarette tax pursuant to RCW 82.24 would, under the circumstances of this case, constitute an unlawful interference with tribal self-government.

Clearly the cornerstone of the District Court's opinion is its conclusion that this case is distinguishable from *Moe v. Consolidated Kootenai and Salish Tribes*, 425 U.S. 463 (1976), because imposition of the State tax would directly and substantially interfere with the exercise of tribal self-government. In *Moe*, this Court concluded that Montana's requirement that an individual Indian seller collect a tax imposed on non-Indians was a minimal burden which did not frustrate tribal self-government within the meaning of *Williams v. Lee*, 358 U.S. 217, 219-220 (1959), or controvene any Congressional enactment dealing with the affairs of reservation Indians. In distinguishing *Moe*, the District Court noted:

> In *Moe* the cigarettes at issue were sold by individual Indians operating businesses and not by tribal enterprises. There was no indication that the sales of cigarettes were tribally financed, managed or regulated. Although the tribe apparently charged an administrative fee, no tribal tax was imposed on the cigarettes sold in the smoke shops, and the tribe itself received no direct benefits from the cigarette sales upon which it depended as a source of revenue for tribal programs. Thus, in the absence of any direct involvement by the tribe, the Court concluded that there was no interference with tribal self-government.

446 F. Supp. at 1364, Appendix A at 39-40.

In contrast, as noted above, the District Court concluded that in the instant case the *Tribes* themselves were directly involved in the conflict with the State, a conclusion grounded upon the stipulated facts. The Tribal ordinances

constituted a "comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations" and the revenues generated were utilized for essential tribal programs.

Although the State has not disputed these facts, it asserts:

> Essentially, the Court below has held that an Indian tribe, *by a mere stroke of a pen*, can preempt State taxing power over non-Indians engaged in economic activities on an Indian Reservation.

Jurisdictional Statement at 17. (emphasis added). In light of the stipulated facts, the State's characterization is neither fair nor accurate; there is nothing in the record to support any implication that the tribal ordinances are an empty formalism, or anything less than the "comprehensive" system the District Court described. They are no more a "mere stroke of the pen" than is the State tax statute.

Nor is there any basis in the record to challenge the Court's conclusion (and the State's concession) that imposition of the State cigarette tax will be utterly destructive of this tribal structure and tax-generating system. The Court summarized this impact and the State's concession as follows:

> The revenue generated by the taxes today has been devoted to the partial funding of programs such as day care, education, nutrition, fire protection and alcoholism of reservation people. The bulk of the revenue derived from the tribal taxes comes from sales to non-Indians. The impact of imposing the State's cigarette tax in addition to the tribal tax will not only eliminate the tribe's competitive advantage but it will give off-reservation retailers a substantial price advantage. Thus, it is not hard to understand why the State conceded that: 'assuming that the Court finds that the

> State could require the Tribe and/or its retailers to add the State tax to its price of cigarettes sold to non-Indians, *it is painfully apparent that very few, if any, cartons of cigarettes would have been sold.*' (emphasis by Court)

446 F. Supp. at 1361-1362, Appendix A at 35.

While not contesting the detriment to the Tribes, the State argues that the impact was nevertheless not an interference with tribal self-government within the meaning of the Court's holding in *Williams v. Lee*, and that the Tribe's claim of exemption was, in effect, an assertion of "intergovernmental immunity", a doctrine whose application to Indian tribes was severely limited by this Court in *Mescalero Apache v. Jones*, 411 U.S. 145 (1973).

The District Court's answer to this argument is logically unassailable. The fact that the *Williams* "interference with self-government" test has been repeatedly reaffirmed by this Court since the intergovernmental immunity doctrine was limited in *Mescalero Apache* is a clear indication that the *Williams* test has an entirely independent life from the intergovernmental immunity doctrine. It is this principle, and not the doctrine of intergovernmental immunity, that is the source of the exemption.

In fact, a careful examination of the authorities makes it apparent that the interference with tribal self-government test was specifically tailored for the kind of situation now before the Court, where non-Indians are involved and both the State and the tribes have an interest in applying their laws to the transaction. In *Williams*, the Court observed:

> There can be no doubt that to allow the exercise of State jurisdiction here would undermine the authority

> of tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. *It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.* [citations ommitted] The cases in this Court have consistently guarded the authority of Indian governments over their reservations. (emphasis added)

358 U.S. at 223.

Similarly, in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), this Court observed that the *Williams* interference with self-government test was specifically designed for situations involving non-Indians:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citation omitted] In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

Id. at 179.[5]

Similarly, in *United States v. Mazurie*, 419 U.S. 544 (1975), this Court observed that the *Williams* test was formulated by the Court "[i]n holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians . . ." *Id.* at 544. More recently, in *Santa Clara Pueblo v. Martinez*, ... U.S. ...., 98 S.Ct. 1670 (May 15, 1978), the

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5. In effect, the State has conceded the applicability of the *Williams* test to the instant case by paraphrasing the Court's *McClanahan* language in its Jurisdictional Statement:

> Both the Tribes and the State can fairly claim an interest in taxing non-Indians on Indian Reservations.

Jurisdictional Statement at 20-21.

Court cited *Williams* for the proposition that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Id.* at 1681.

In short, the factual basis for the Court's conclusion that imposition of the State cigarette and tobacco products taxes would interfere with tribal self-government is uncontested; the applicability of the *Williams* test to these circumstances where "both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions" is indisputable in light of *McClanahan, Mazurie* and *Martinez.*

In its Jurisdictional Statement, the State argues that the District Court's holding elevates Indian tribes to the status of "full sovereigns" and to "a position of political power far outstripping that of the States themselves." Jurisdictional Statement at 18-19. The State's characterization is highly overstated. The District Court has done no more than hold, consistent with *McClanahan* and *Williams,* that when both the State and a tribe have an interest in applying their laws because of the involvement of non-Indians on a reservation, State law may not be applied if it will affect tribal self-government.

It must be emphasized that the District Court has applied the *Williams* test in a careful and limited manner. For example, the District Court held that the Tribes had the burden of establishing an interference with self-government:

> Outside the 'special area of State taxation' [where a State tax is invalid because its legal incidence falls upon a reservation Indian] the Tribes have the burden of establishing that a challenged State regulation 'frustrates tribal government, *see Williams v. Lee,* 358 U.S. 217, 219-220 (1959), or runs afoul of any Congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan,* 302 U.S. 535, 539 (1938) . . .'

446 F. Supp. at 1356-1357, Appendix A at 25, citing *Moe,* 425 U.S. at 483.

In addition, the Court specifically refused to hold that any merely theoretical conception of interference with the functions of government was sufficient to justify an invalidation of a State tax. 446 F. Supp. at 1363, Appendix A at 38.

The District Court stated:

> [W]hat the Courts must avoid is utilizing the *Williams* test to strike down such State regulation based on 'merely theoretical conceptions of interference with the functions of [tribal] government.' In other words, if a Tribe has proved and/or a State concedes that the State regulation causes actual interference with the performance of the governmental obligations, the Courts must, consistent with *Williams,* strike the regulation down.

446 F. Supp. at 1363-1364, Appendix A at 39.

Nor was an "indirect economic impact" sufficient to void a State tax, according to the Court. 446 F. Supp. at 1364, Appendix A. On the other hand, the Court concluded:

> A restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribe's ability to carry out their tax financed self-governing functions.

446 F. Supp. at 1365, Appendix A at 41.

The District Court's holding is manifestly correct and

scrupulously attuned to this Court's prior rulings. An affirmance of the judgment is therefore appropriate without further briefing.

2. No substantial questions are presented regarding the power of Indian tribes to tax non-Indians.

In its Jurisdictional Statement at 18, relying by analogy on this Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes do not have authority to try and punish non-Indians, the State argues that "[w]hether exercising the taxing power over non-Indians is inconsistent with the Tribes' status is an important federal question."

However, any question of an Indian tribe's power to tax non-Indians doing business on the reservation has been settled for almost three-quarters of a century. *See Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). *See also Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (9th Cir. 1956); *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (9th Cir. 1958). Indeed, in the proceedings below, the State of Washington did not contest the authority of the Tribes to tax non-members purchasing cigarettes on the Reservation. The contention that the Tribes lack such power was not raised by the State until its Motion for Partial New Trial, filed after this Court's decision in *Oliphant*.

There is simply nothing in the *Oliphant* opinion itself to suggest that this Court intended to overrule well-established precedents supporting tribal authority to tax non-Indians. Central to the Court's analysis in *Oliphant* was its

conclusion from a detailed historical investigation that Congress, the Executive Branch and the lower courts shared an assumption that Indian tribal courts did not possess criminal jurisdiction over non-Indians, a view that this Court regarded as implicitly confirmed by its decision in *In Re Mayfield*, 141 U.S. 107 (1891).

Civil taxing jurisdiction over non-Indians, on the other hand, was specifically upheld by the Court in *Morris v. Hitchcock, supra*, and other cases. The Court in *Oliphant* made no mention of *Morris v. Hitchcock* or of the other cases supporting tribal civil jurisdiction over non-Indians, such as *Williams v. Lee*, *McClanahan*, and *United States v. Mazurie*. A reading of *Oliphant* that would support the conclusion that this Court overruled these authorities by implication without mentioning them is obviously overbroad.

Even more significant, however, is *Santa Clara Pueblo v. Martinez*, ... U.S. ...., 98 S.Ct. 1670 (May 15, 1978) which was decided by this Court after *Oliphant*. As noted in the previous section, in *Martinez* this Court specifically reaffirmed the *Williams v. Lee* holding that tribal courts have been repeatedly recognized as the appropriate forum for the *exclusive* resolution of disputes affecting important personal and property interests of both Indians and non-Indians. The State's argument that *Oliphant* undermined these authorities by implication is untenable in light of *Martinez*.

In addition to these judicial precedents, the United States government has officially expressed its position that Indian tribes possess such authority in a Solicitor's Opin-

ion[6] and §16 of the Indian Reorganization Act, confirming in the tribes those powers vested by existing law, has been viewed as a confirmation of such power. *See Iron Crow v. Oglala Sioux Tribe*, 231 F.2d at 99.

Finally, it must be emphasized that because of the structure of the tribal cigarette ordinances, it is not necessary for the Tribes to resort to the exercise of any prohibited criminal jurisdiction in order to collect their taxes since the tax is included in the purchase price and is automatically remitted upon the purchase of the taxed goods. Accordingly, there is no need for the Tribe to resort to either criminal or civil jurisdiction in order to enforce the tax.[7]

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6. After §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476, provided that tribal governments organized pursuant to the Act would have certain enumerated powers *and* those "powers vested in any Indian tribe or tribal council by existing law", the Solicitor for the Department of Interior set forth the position of the United States government as to the existing powers of Indian tribes in this Opinion. The Solicitor observed:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc. to which taxes may be attached as conditions.

55 I.D. 14, 46 (1934).

Each of the Tribal constitutions, as approved by the Secretary of the Interior, specifically sets out the authority of the Tribes to tax non-members. *See* Constitution of the Confederated Tribes of the Colville Reservation, Article V, Section 1(E), approved February 26, 1938—Plaintiffs' Exhibit 10.1; Constitution of the Lummi Tribe, Article VI, Section 1(F), approved April 2, 1948—Plaintiffs' Exhibit 10.2; Constitution of the Makah Tribe, Article VI, Section 1(G), approved May 16, 1936—Plaintiffs' Exhibit 10.3.

7. On the other hand, *Williams*, *McClanahan*, *Mazurie* and *Martinez* strongly suggest that a tribe *could* resort to exercise of civil jurisdiction in order to enforce its tax if that became necessary. Similarly, a tribe could presumably bring suit pursuant to 28 U.S.C. §1362 in federal court in order to enforce a tax obligation. However, any questions as to the exercise of such enforcement powers by the Tribes are not presented by the instant case.

3. No substantial federal question is presented as to whether the State can impose its "excise" tax on Indian-owned vehicles used both on and off the Reservation.

In its Jurisdictional Statement and in the proceedings below, the State concedes that the legal incidence of Washington's vehicle excise taxes fall upon the owner of the vehicle, in the instant case upon Indians resident on the reservations. The State also concedes that as long as the vehicle is used entirely on the Reservation no tax can be imposed, but argues that as long as the vehicle is used both on and off the Reservation, the question of validity of the tax lies precisely between the holdings of this Court in *McClanahan* and *Mescalero Apache*.

However, as the District Court noted, Washington's excise tax is precisely identical in operation to the Montana property tax invalidated by this Court in *Moe*. Although these taxes are denominated as "excise taxes", each is imposed and assessed annually on a specified percentage of the fair market value of the vehicle for the privilege of using it within the State of Washington. 446 F. Supp. at 1365, Appendix A at 42. A review of the District Court's decision in *Moe* reveals that the vehicle use taxed by the State of Montana, like the use in the instant case, was partly on and partly off the Flathead Reservation. 392 F. Supp. 1325, 1328-29. The issue which the State attempts to raise, therefore, has already been resolved by this Court.

CONCLUSION

For the reasons stated, those portions of the appeal relating to the State motor vehicle excise taxes and the as-

sumption of jurisdiction over the Makah and Lummi Reservation should be dismissed. The remaining portions of the appeal should be affirmed.

DATED this 30th day of November, 1978.

Respectfully submitted,

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